IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Civil Suit No. 32 of 2001

Judgment reserved on 24.11.2006

Date of decision 19.12.2006

Rajesh Kumar Sood **…Plaintiff.**

Versus

Jamshed Nowrojee and others **…Defendants.**

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.

Whether approved for reporting?

For the plaintiff: **Mr. Ramakant Sharama, Advocate.**

For the defendants : **Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.**

Surjit Singh, Judge

The present suit has been filed by plaintiff Rajesh Kumar Sood for specific performance of an agreement to sell immovable property, allegedly executed by late Shri N.N. Nowrojee. The cause of action, as disclosed in the plaint, may be summed up thus.

2. Late Shri N.N. Nowrojee was the exclusive owner of property bearing Khasra Nos. 463 to 472 and 474, measuring 0-16-92 Hectares, situate in Up-Mohal Mcleodganj, Mauza Dharamshala, as per Jamabandi

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Whether reporters of Local Papers may be allowed to see the Judgment?

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for the year 1992-93 (hereinafter referred to as first property). He was also a co-owner, along-with defendant No. 1 Jamshed Nowrojee and defendant No. 4 Navaz Nowrojee, of the property comprised in Khasra Nos. 475, 476, 477 and 251, measuring 0-23-71 Hectares, situate in the same Mohal and entered in the same Jamabandi as his exclusive property described earlier and hereinafter referred to as second property. He entered into an agreement with the plaintiff for the sale of the first property as also his share in the second property. Acting as the attorney of defendants No. 1 and 4, he also entered into an agreement to sell their shares in the second property to the plaintiff. He showed the instruments of power of attorney executed by the above said two defendants No. 1 and 4 in his favour, at the time he executed the agreement in favour of the plaintiff. The agreement was executed on 17.7.2000. Sale consideration of both the properties was fixed at Rupees forty lacs. Rupees ten lacs were paid in cash, as part of the sale consideration, at the time of the execution of the agreement. The remaining amount was agreed to be paid on or before 16.7.2002, an outer time limit fixed for the execution of the sale deed. Unfortunately late Shri N.N. Nowrojee expired on 24.10.2000. Soon after his death, the plaintiff issued notices to defendants No. 1 and 4, who are co-owners of a part of the suit property, agreed to be sold to the plaintiff, as also to defendants No. 2, 3 and 5, who are the sons and widow of late Shri N.N. Nowrojee, informing them that late Shri Nowrojee had executed agreement to sell the properties in his favour and that they should not alienate or encumber the same. In response to the said notice, the defendants denied that late Shri N.N. Nowrojee executed any agreement. At the same time they asked for a copy of the agreement. The plaintiff supplied them a copy of the

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agreement, but thereafter there was no response from the defendants. The properties agreed to be sold consist of some vacant land and some land under structures. The possession of the vacant land was delivered to the plaintiff at the time of the execution of the agreement. The possession of the land on which structures stand, was agreed to be delivered at the time of the execution and registration of the sale deed and on payment of the remaining sale consideration of Rupees thirty lacs. The plaintiff had always been ready and willing and was still ready and willing to perform his part of the contract, when he filed the suit for specific performance. In the alternative he prayed for passing a decree for a sum of Rupees forty lacs or such amount as the Court might determine, on account of refund of earnest money along-with interest at the rate of 24%.

3. Defendants have filed a common written statement in which it has been denied that the agreement, set up by the plaintiff, was executed by late Shri N.N. Nowrojee. The document is alleged to be bogus, fabricated and forged. It has been denied that the agreement bears the signatures of late Shri N.N. Nowrojee. In the alternative it is stated that if the signatures on the agreement are found to be genuine, the plaintiff might have obtained the same on blank papers on the pretext of pursuing a Civil Writ Petition, which was pending in this Court and in which the plaintiff and late Shri N.N. Nowrojee were having common interest and after the death of Shri N.N. Nowrojee, the plaintiff mis-used those blank papers bearing the signatures of late Shri N.N. Nowrojee for fabricating the agreement. It is denied that a sum of Rupees ten lacs had been received by late Shri Nowrojee from the plaintiff. It has been stated that under the provisions of Income Tax Act payment of a sum of Rupees ten lacs cannot be made in

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cash but only by a cheque or bank draft. It is also alleged that two years prior to his death Shri Nowrojee had once expressed that he was afraid of the plaintiff. Further it is alleged that all the defendants had very cordial relations with late Shri N.N. Nowrojee and he would not have entered into an agreement for the sale of the suit property, which was inherited by him from his forefathers, without consulting them; rather without taking them into confidence. It is stated that as a matter of fact late Shri N.N. Nowrojee had sentimental attachment with the suit property, on account of its ancestral nature and could not have even dreamt of selling it. It is also alleged that on 20.7.2000 or say after the execution of the alleged agreement, late Shri N.N. Nowrojee had offered the suit property to Punjab National Bank and State Bank of India for lease and this fact indicated that he had not executed any agreement in favour of the plaintiff. The plaintiff is alleged to have suppressed material facts. Also, it is alleged that there is no privity of contract between the plaintiff and the defendants. It has been denied that any portion of the suit property is in possession of the plaintiff. It is further stated that on the death of late Shri N.N. Nowrojee no money was found in cash nor had he deposited the amount of Rupees ten lacs, allegedly paid by the plaintiff, in any of his bank accounts and this fact indicated that he had not received any amount of money from the plaintiff.

4. The plaintiff filed replication in which he denied all the allegations of the defendants and reiterated his own version. He admitted that late Shri N.N. Nowrojee had offered to lease out the suit property to Punjab National Bank on 20.7.2000, but pleaded that it was at his instance that Shri Nowrojee made the offer to the bank, because he (plaintiff) too had offered his own property, situated close by, to the bank on lease basis

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and since the property had been agreed to be sold to him by late Shri Nowrojee, he wanted that this property was also leased to the banks, so that he could start getting income immediately after the execution of the sale deed in his favour.

5. Following issues were framed by this Court on the pleadings of the parties:-

1. Whether late Shri N.N. Nowrojee validly executed the agreement of sale dated 17.7.2000 on his own behalf and on behalf of defendants No. 1 and 4 as alleged? OPP.
2. Whether the plaintiff paid an amount of Rs.10 lakhs to late Shri N.N. Nowrojee as part payment of sale consideration as alleged? OPP
3. Whether the plaintiff has always been ready and willing to perform his part of the agreement as alleged? OPP
4. Whether the plaintiff is entitled to a decree for specific performance of the alleged agreement dated 17.7.2000? OPP
5. In case issue No. 4 is decided in the negative, whether the plaintiff is entitled to the alternative relief for the recovery of Rs.40,00,000/- alongwith interest as claimed? OPP
6. Whether the suit in the present form is not maintainable as alleged? OPD
7. Whether the plaintiff is estopped from filing the present suit on account of his own acts, deeds and conduct as alleged? OPD
8. Relief.

6. I have heard the learned counsel for the parties and gone through the record. My issue-wise findings are as follows.

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Issue No. 1.

7. The agreement upon which the claim of the plaintiff is based, is Ext. PW-4/A. Three witnesses have been examined by the plaintiff, including himself to prove the document. The plaintiff himself has appeared as PW-4. The other two witnesses are PW-5 Prit Nath and PW-6 Chander Mohan Kashmiri, by whom the document purports to be attested.

8. The document has seen the light of the day after the death of late Shri N.N. Nowrojee, by whom it purports to be executed as the prospective vendor. The document is dated 17.7.2000. Late Shri Nowrojee, the alleged executant, died on 24.10.2000. It was after the death of said late Shri Nowrojee that the plaintiff issued notices to the defendants informing them about the execution of the agreement by him (late Shri Nowrojee) and requiring them not to alienate or encumber the suit property. Since the alleged executant of the document is not alive to admit or deny the execution of the document or to explain the circumstances under which his signatures appeared on this document and the defendants, some of whom are his legal heirs and some others are the persons who had appointed him as their attorney, deny the execution of the document, burden lies heavy upon the plaintiff to prove the execution of the document. As a matter of fact, in these peculiar facts and circumstances, the standard of proof has to be similar to the standard of proof of a will.

9. No doubt PW-4 Rajesh Kumar (plaintiff) and the two purported attesting witnesses of the document, namely PW-5 Prit Nath and PW-6 Chander Mohan Kashmiri, have testified that the document was typed on the basis of a draft, which late Shri N.N. Nowrojee produced from his pocket and that after it was typed by the plaintiff in the office of PW-6 Chander

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Mohan Kashmiri, late Shri Nowrojee and the plaintiff executed the document as prospective vendor and vendee, respectively, and thereafter the document was attested by PW-5 Prit Nath and PW-6 Chander Mohan Kashmiri, but there are some inconsistencies in the testimony of these three witnesses and several other facts & circumstances, which render the execution of the document highly suspicious.

10. The plaintiff claims to have paid Rupees ten lacs in cash to late Shri N.N. Nowrojee at the time of the execution of the document. He has tried to show that he had ready cash of more than Rupees ten lacs with him on the relevant date as reflected in his account books. He produced the account books while in the witness box as PW-4 and tendered the Photostat copies of the relevant entries. The same are Ext. PW-4/B, copy of entries in cash book and Ext. PW-4/C, copy of entries in the ledger. The plaintiff did not explain why the copies of the entries in the aforesaid two account books had not been submitted along-with the plaint. He did not submit these copies even before the framing of the issues. The issues were framed on 10.12.2001. These copies, along-with some other documents, were submitted on 22.12.2001 through a list. No explanation what-so-ever has been offered for not producing these copies with the plaint or at-least before the framing of the issues, even though the account books were in his custody, when the suit was filed. Thus, there are chances of these entries in the account books of the plaintiff, being not genuine.

11. Non-judicial papers, numbering two and worth Rs.5/- each, upon which the agreement Ext. PW-4/A is type written, were purchased by the plaintiff himself and that too not at Dharamshala, where the agreement

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was executed and where late Shri Nowrojee resided and the property is situate, but at Palampur, as testified by the plaintiff himself while appearing as PW-4. The explanation given by the plaintiff in his testimony as PW-4 is that late Shri Nowrojee himself had told him to buy the papers from some other station as non-judicial and judicial papers were not available at Dharamshala during those days. The explanation on the face of it appears to be an after-thought. The defendants in preliminary objection No. 6 of their written statement specifically stated that the stamp papers on which the agreement is type written, do not appear to have been purchased at Dharamshala and that it also appears that the two papers had not been bought together. The plaintiff while replying to this averment in the replication, stated that the stamp papers were purchased by him at Palampur simultaneously. He, however, offered no explanation for purchasing the stamp papers at Palampur instead of at Dharamshala, where late Shri Nowrojee resided and where the property is situated and the agreement was executed. Therefore, the explanation, which he has offered for the first time in his testimony, cannot be believed unless corroborated. And corroboration is not there.

12. Ext. PW-4/A, the agreement purports to have been executed on 17.7.2000. The defendants in preliminary objection No. 9 of the written statement have pleaded that on 20.7.2000 late Shri Nowrojee had sent some letters to the State Bank of India and Regional Manager, Punjab National Bank, Dharamshala offering the premises, standing on a portion of the subject matter of the agreement, on lease basis and that had there been any agreement for the sale of the property in favour of the plaintiff, as claimed by him, there could not have been any occasion for late Shri

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Nowrojee writing the said letters to the Banks. While replying to this averment, the plaintiff in his replication did not deny that late Shri Nowrojee had written the letters to the Banks offering the property on lease, but claimed that it was at his instance that he wrote such letters, because he had also offered his own property situated close by to the aforesaid Banks and wanted that the suit property, which he had agreed to purchase, be also leased out to the Banks so that the property started giving him dividends immediately on execution of sale deed in his favour. However, while in the witness box as PW-4, the plaintiff has not said even a word about this plea, which means that the same may not be correct.

13. The stamp vendor, from whom the non-judicial papers were allegedly purchased, has not been examined. The stamp papers on which the initial part of the agreement is type written, bears a number and some date suggesting that the paper was sold on 13.7.2000. The agreement is purported to have been executed on 17.7.2000. There is no explanation why the paper was purchased on 13.7.2000. Also, there is no mention in the endorsement regarding the purchase of the non-judicial paper as to for what purpose these papers had been purchased. One paper purports to have been purchased in the name of late Shri N.N. Nowrojee and the other in the name of the plaintiff. Purported signatures of both late Shri Nowrojee and the plaintiff appear below the endorsements regarding sale of these papers. It is the plaintiff's own case that he himself purchased the papers at Palampur and late Shri Nowrojee was not with him. If Shri Nowrojee was not there when the papers were purchased, his signatures could not have been there below the endorsements regarding sale of these papers as one

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of the 'purchasers' of the paper. The plaintiff has offered no explanation in this behalf.

14. Both the papers bear the purported signatures of late Shri Nowrojee, on the front side as also on the reverse. Two signatures, one in the margin and one at the bottom are there on the front side and three on the reverse of each of the two papers. On the front side of the first paper introductory part, the description of the property and the factum of there being an agreement between the parties for the sale of the property is type written. On the front side of the second paper, which is marked as 'second page' terms and conditions of the agreement numbering 1 to 5 are written. Below these five conditions following para, which is generally written to conclude the document, appears:-

> "Both the above parties set their hands on this agreement Deed on this 17th day of July, 2000. at Dharamsala in the presence of The marginal witnesses."

Then on the left hand-side word 'witnesses' is type written in capital letters and underlined. Below it the names and the addresses of the witnesses Chander Mohan Kashmiri and Prit Nath are type written. Above these type written names and addresses, signatures of the witnesses are there. Then at the bottom, to the right side of the names and addresses of the witnesses, name of late Shri Nowrojee as 'first party' is type written and above it his purported signature is there. To the right side of the name of late Shri Nowrojee, name of the plaintiff as 'second party' is type written and above it is written his signature with date below it. The names of late Shri Nowrojee and the plaintiff are type written at the bottom. Above their signatures, a note is type written in three lines, which reads as under:-

> "Note:-This agreement shall be read with
> conditions Nos. 6, 7, 8 & 9 and a note on

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overleaf."

15. From a bare look at this second sheet of non-judicial paper, it is clear that there was unusually larger space between the purported signature of late Shri Nowrojee and the signature of the plaintiff at the bottom and the last paragraph type written on this sheet, which could have undoubtedly given an impression on the first look to anybody that the purported signature of late Shri Nowrojee was already there on this sheet, when the terms and conditions of the agreement were type written thereon and so with a view to filing this gap, the aforesaid note was type written. Another reason for typing this note appears to be to type write something above the purported signatures of late Shri Nowrojee appearing on the reverse of the two non-judicial papers.

16. As already noticed, there are three purported signatures of late Shri Nowrojee on the reverse of each of the two non-judicial papers. On the first page one signature is on the top, another in the middle and the last at the bottom. Conditions No. 6,7, 8 and 9, reference to which is there in the note at the foot of the second non-judicial paper, have been typed on the reverse of the first sheet. Conditions No. 6 and 7 are typed between the signatures on the top and in the middle and conditions No. 8 and 9 are typed between the signatures in the middle and at the bottom. Signatures of the plaintiff are also there in the middle and at the bottom to the right side of the purported signatures of late Shri Nowrojee. Below the signatures of the plaintiff and the purported signatures of late Shri Nowrojee, there are signatures of the two attesting witnesses and below their signatures, their names and the words and figures "witness No. 1 and witness No. 2" are also type written. There was hardly any need for the plaintiff and late Shri

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Nowrojee to have put their signatures below conditions No. 6 and 7 and above conditions No. 8 and 9 on the reverse of the first sheet of non-judicial paper. It appears that the signatures of late Shri Nowrojee were already there in the middle and at the bottom and of course even on the top of the reverse of the first sheet of non-judicial paper when conditions No. 6 to 9 were typed thereon and that is why late Shri Nowrojee's signature is there below conditions No. 6 and 7 and then below conditions No. 8 and 9.

17. On the reverse of the second non-judicial paper one purported signature of late Shri Nowrojee is just below the endorsement regarding sale of stamp paper, the other signature is about two inches below it and the third signature is in the middle of the paper. The space between the first signature and the second signature is not much and did not require its filling up. However, the space between the second and the third signatures is much and it appears that with a view to explaining so many signatures on the reverse, the plaintiff devised to fill this space by a note and then put his own signatures parallel to the signatures of late Shri Nowrojee and below these two signatures, the two witnesses also put their signatures.

18. This style of executing the document, with five conditions type written on the front side of second non-judicial paper and below those conditions the concluding para type written, which is usually written below every document and then writing a note about conditions No. 6,7, 8 and 9 appearing on the reverse of one of the non-judicial papers and then the execution of conditions No. 6, 7, 8 and 9 on the reverse of one of the non-judicial papers in two parts, each containing two conditions and the execution of another note on the reverse of the second sheet of the non-judicial paper, is unusual and contrary to the well known practice and format

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of executing documents. It is not the case of the plaintiff that the parties were unaware of the usual style, practice and the format of executing documents. On the contrary, two other documents executed between late Shri Nowrojee and the present plaintiff and several other documents executed by late Shri Nowrojee in favour of some other persons and some documents executed by or in favour of the plaintiff, have been proved, which all are executed in the usual form and in the generally followed style.

19. It may also not be out of place to notice that the note, written on the reverse of the second non-judicial paper, had no relevance with the deal that purports to have been struck between the plaintiff and late Shri Nowrojee by means of this document and this fact also indicates that the signatures of late Shri Nowrojee were there on the reverse of the two stamp papers, when this note was type written and this was probably done on realizing that it would be very difficult to explain a number of signatures of late Shri Nowrojee appearing on the reverse of the two stamp papers, if something was not written above them.

20. There is also no evidence, except the bald statement of the plaintiff himself, which is contradicted by the testimony of the witnesses of the defendants, in support of the contention that the possession of the vacant portion of the suit property had been delivered to the plaintiff at the time of execution of the document. The plaintiff in his testimony as PW-4 has stated that the possession of the vacant land had been delivered to him. One of the defendants, namely Jamshed Nowrojee, while in the witness box, has stated that the property consists of a building and land appurtenant thereto and that after the death of late Shri N.N. Nowrojee, his brother, he has been managing and looking after the property. In other

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words, the witness claims that the possession of the entire property is with the defendants. No cross-examination qua this part of his statement has been directed. Thus, the statement remains unchallenged. The defendants examined another witness, namely Madan Gopal (DW-1), who has stated quite categorically that the possession of the property in dispute is with the defendants after the death of late Shri N.N. Nowrojee. Though a suggestion was thrown to the witness in cross-examination that the possession was with the plaintiff, he denied the same. In the light of the evidence referred to in this para, it cannot be said that the possession of the vacant portion of the suit land is with the plaintiff. Now, if no portion of the suit land, leave alone the entire vacant portion, is with the plaintiff, it considerably demolishes the plaintiff's case, because the plaintiff has taken the plea that at the time of execution of the agreement, possession of vacant portion of the suit property was given to him.

21. The two marginal witnesses, by whom the agreement purports to be attested, are interested in the plaintiff. Both of them, according to their own testimony as also the testimony of the plaintiff himself, have been having money dealings with the plaintiff.

22. Also, there are some contradictions in the testimony of the plaintiff and the two attesting witnesses. The plaintiff himself has stated, while appearing as PW-4, that late Shri Nowrojee brought the draft of the agreement and then the conditions in the draft were discussed and thereafter the agreement was typed. He has stated that no addition was made to the terms and conditions of the draft originally brought by late Shri Nowrojee. PW-5 Prit Nath, however, has stated that after the agreement was typed and executed, two – three more conditions were added and

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thereafter the parties again appended signatures to the agreement. He has stated that this happened twice, meaning thereby that the conditions were added twice and signatures by the parties and the witnesses were also appended twice after the execution of the agreement. Further, this witness has stated that the document was typed partly on the basis of the draft brought by late Shri Nowrojee and partly on the basis of additional material dictated by Shri Nowrojee. PW-6 Chander Mohan Kashmiri has also stated that after the agreement was typed out, it was noticed that some more terms were required to be incorporated and so some further conditions were added

23. Again, while the plaintiff himself says that he purchased the non-judicial papers at Palampur and it was he who was having those papers when the typing work started, PW-6 Chander Mohan Kashmiri, in whose office the document was typed, has stated that the non-judicial papers were handed over by late Shri Nowrojee along-with the draft of the agreement.

24. The above discussion leads to a safe conclusion that late Shri N.N. Nowrojee did not enter into any agreement with the plaintiff for the sale of the property, described in the plaint and that the document dated 17.7.2000, upon which the claim of the plaintiff is based, is not a validly executed document. Issue is answered accordingly.

Issue No. 2.

25. In view of the finding on issue No. 1 and the evidence discussed under the said issue with regard to the plea of payment of Rupees ten lacs in cash by the plaintiff to late Shri N.N. Nowrojee, this issue is also answered in the negative.

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Issue No. 3.

26. The plaintiff has pleaded as also testified that he has always been ready and willing to perform his part of the agreement and is still ready and willing to perform his part of the agreement. Hence the issue is answered in his favour.

Issue No. 4

27. In view of the finding on issues No. 1 and 2, it is held that the plaintiff is not entitled to the relief of specific performance of the alleged agreement dated 17.7.2000. Issue is answered accordingly.

Issue No. 5.

28. In view of the findings on issues No. 1 and 2, it is held that the plaintiff is not entitled even to the alternative relief. So the issue is answered against him.

Issue No. 6.

29. No defect in the form of the suit was pointed out during the course of final hearing nor is it elaborated in the written statement as to what defect is there in the form of the suit. So the issue is answered against the defendants.

Issue No. 7.

30. No evidence with respect to this issue has been led. So the same is answered against the defendants.

Relief

31. In view of the findings on issues No. 1 to 5, suit is dismissed with costs.

Decree sheet be drawn accordingly.

December 19, 2006 (BC) **(Surjit Singh)**
Judge